

Wildlife Restoration/Hunter Education Advisory Team

Advisory 2020-022: Legal Authorities for Determining Eligible and Allowable Costs/Activities Under the Wildlife Restoration Act

November 3, 2020



How do the regulations at 2 CFR 200 and 50 CFR 80 align with the Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act?

Introduction: The Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act (Public Law 116-94, Dec. 20, 2019) adds a definition at 16 U.S.C. 669a(3) for *hunter recruitment and recreational shooter recruitment* as "any activity or project to recruit or retain hunters and recreational shooters." The definition continues to describe examples of the type of activities that could support hunter and recreational shooter recruitment. The language "any activity or project" is very inclusive and leads to questions as to what authorities govern "any."

The Wildlife & Sport Fish Restoration Program (WSFR) and the Association of Fish & Wildlife Agencies (AFWA) legal advisors recently met with WSFR and State representatives to advise on how the authorities are applied considering the language under the Modernizing PR Act. This document starts with the Advisory and then presents the information upon which the Advisory is based. The Discussion section includes information that will help improve understanding of how the levels of authority work together.

The primary conclusion is that we use the authorities in concert with each other to make funding decisions.

Advisory: The phrase in the statute "any activity or project" does not in itself allow for literally "any" activity to be allowable. Rather, the statute, regulations, and other authorities work in concert to affirm eligible and allowable activities. A clearly written grant application that meets the criteria set within this framework allows for a large variety of activities/costs that support R3 to be considered eligible and allowable.

Costs of goods and services, and activities using funds under the Modernizing PR Act that clearly demonstrate that the costs/activities directly support the grant objective to recruit or retain hunters and recreational shooters (R3) may be considered eligible using funds at:

16 U.S.C. 669c(c) (R3)

16 U.S.C. 669h-1 (Enhanced Hunter Education/R3)

We consider if activities are eligible under the Wildlife Restoration Act and 50 CFR Part 80, costs are allowable under Federal cost principles at 2 CFR Part 200 and other regulations, and the project meets all standards that govern Federal Financial Assistance (FFA). All activities must be eligible, and all costs must be allowable to receive grant approval. This also includes terms and conditions of a Federal award (see <https://www.fws.gov/grants/atc.html> for Standard Award Terms and Conditions) and may be set on a case-by-case basis if a recipient or a project is deemed to require additional

parameters in which to apply public funds. The Act, regulations, and other standards set by the Secretary of the Interior work together to support eligible and allowable costs/activities. If the Act, regulation, or standards set specifically prohibit a cost or activity, it must not be included in a Federal grant. 2 CFR 200 allows for flexibility when otherwise unallowable costs or activities can be shown to directly support the objectives of the grant and are included in a Federal award. 2 CFR 200.420 allows the Service to interpret the Cost Principles to allow certain costs when included in an approved Federal award as supporting the objectives of the award. It is important for applicants to specifically identify costs that the Cost Principles at 2 CFR 200 describe as potentially unallowable, so that the Service may consider if those costs are supported as needed to meet the objectives of the award, and if so, will be included in an approved Federal award. To be considered allowable under the Federal grant, we must apply the following factors, as stated at 2 CFR 200.403:

- (a) Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.
- (b) Conform to any limitations or exclusions set forth in these principles or in the Federal award as to types or amount of cost items.
- (c) Be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the non-Federal entity.
- (d) Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.
- (e) Be determined in accordance with generally accepted accounting principles (GAAP), except, for state and local governments and Indian tribes only, as otherwise provided for in this part.
- (f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period. See also §200.306 Cost sharing or matching paragraph (b).
- (g) Be adequately documented. See also §§200.300 Statutory and national policy requirements through 200.309 Period of performance of this part.
- (h) Cost must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to §200.308(e)(3).

Authorities: These are the primary authorities discussed in this paper.

Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act (Pub. L. 116-94, Dec. 20, 2019) (Modernizing PR Act); codified at 16 U.S.C. 669 et seq.

Administrative Requirements, Pittman-Robertson Wildlife Restoration and Dingell-Johnson Sport Fish Restoration Acts, 50 CFR Part 80

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR 200

Discussion:

Terms: We have discovered that often the words “eligible” and “allowable” are used interchangeably and that can cause confusion. The terms are not the same. The former refers to

costs/activities that are acceptable to support the grant program and the latter refers to cost/activities that are acceptable in a Federal grant.

Eligible means that the grant program, that was established under law, supports the costs and/or activities to be authorized under the U.S. Code (see 16 U.S.C. 669) and supporting regulations (see 50 CFR 80) issued by the agency.

Allowable means that the cost described in a Federal grant is acceptable using the principles established by the Office of Management and Budget at 2 CFR 200.

Background: The order of precedence for authorities that govern the activities of U.S. Fish and Wildlife Service and the Wildlife & Sport Fish Restoration Program (WSFR) are primarily:

- A. Public laws, passed by Congress and signed by the President, providing authorizing legislation for Federal grant programs and associated funding.
- B. Regulations that agencies publish to implement public laws. Regulations are not technically laws but have the force and effect of law. An advantage of regulations is that they are developed giving opportunity for public input, allowing agencies to communicate with the public they serve.
- C. Departmental and Fish and Wildlife Service policies, including Fish and Wildlife Manual Chapters. and documents.

Rulemaking Authority:

Congress, representing the Legislative Branch of government, has the authority to promulgate laws and can delegate authority to Federal agencies in the Executive Branch to develop and publish rules to implement the laws. These rules have the force and effect of law. Rulemaking is governed under the provisions of the Administrative Procedure Act (P. Law 79-404, June 11, 1946, 5 U.S.C. 551 et. seq.) The Wildlife Restoration Act states that, “The Secretary of the Interior is authorized to make rules and regulations for carrying out the provisions of this chapter” (16 U.S.C. 669i).

Through the Office of Management and Budget (OMB) the Executive Branch published 2 CFR 200 as an extension of the agency authority to govern Federal financial assistance (FFA). Considerations that have been made over the years for FFA include underlying principles of appropriate use of Federal funds that come from taxpayer dollars, accountability, public interest and purpose, maintaining the public trust, and creating standards that uphold the purposes of the laws Congress supports.

Standards for Grants:

The authority of the Secretary of the Interior, under the Wildlife Restoration Act, is generally delegated to the U.S. Fish and Wildlife Service, which is responsible for implementing the Wildlife Restoration programs and subprograms pursuant to 16 U.S.C. 669, et seq. The statute states that: “The Secretary of the Interior and the State fish and game department of each State accepting the benefits of this chapter, shall agree upon the wildlife-restoration projects to be aided in such State under the terms of this chapter and all projects shall conform to the standards fixed by the Secretary of the Interior.” The “standards of the Secretary” include applicable Federal laws for programs, Federal laws for financial assistance, Departmental regulations and policies, any regulations and

policies that are promulgated under the Department's authority, and terms and conditions of a grant.